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Art Unit: 3652
Examiner #69753
Knx: 3A25
Date: 6/7/11
Case Serial 08/752565

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Continuity/Reexam Information for 08/752565

Parent Data

08752565, filed 11/21/1996, now U.S. Patent #5915912 claims foreign priority to 116100, filed 11/22/1995

Child Data

09894897, filed on 06/29/2001 and having 1 RCE-type filing therein, is a reissue of 08752565, filed on 11/21/1996, now U.S. Patent #5915912
11352518, filed on 02/13/2006 is a reissue of 08752565, filed on 11/21/1996, now U.S. Patent #5915912

[Appln Info](#) [Contents](#) [Petition Info](#) [Atty/Agent Info](#) [Continuity/Reexam](#) [Foreign Data](#) [Inventors](#) [Address](#) [Fees](#) [Post Info](#) [Pre G](#)

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Application Number Information

Application Number: 11/352518 AssignmentsFiling or 371(c) Date: 02/13/2006 eDan

Effective Date: 02/13/2006

Application Received: 02/13/2006

Patent Number:

Issue Date: 00/00/0000

Date of Abandonment: 00/00/0000

Attorney Docket Number: 053332-02-5006

Status: 89 /ALLOWANCE COUNTED

Confirmation Number: 4793

Examiner Number: 69753 / KEENAN, JAMES

Group Art Unit: 3652

IFW Madras

Class/Subclass: 414/664.000

Lost Case: NO

Interference Number:

Unmatched Petition: NO

L&R Code: Secrecy Code: 1

Third Level Review: NO

Secrecy Order: NO

Status Date: 08/25/2010

Oral Hearing: NO

Title of Invention: FORK LIFT APPARATUS ADAPTED TO BE COUPLED TO A TRUCK OR TRAILER


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752565 (08) 5915912 June 29, 1999

UNITED STATES PATENT AND TRADEMARK OFFICE GRANTED PATENT

5915912[Get Drawing Sheet 1 of 18](#)[Access PDF of Official Patent *](#)[Order Patent File History / Wrapper from REEDFAX®](#)[Link to Claims Section](#)

June 29, 1999

Fork lift apparatus adapted to be coupled to a truck or trailer

EXPIRATION: June 29, 2007 - due to failure to pay maintenance fees. (O.G. August 21, 2007)
April 3, 2008 - REINSTATED due to acceptance of delayed payment of maintenance fee. (O.G.
April 29, 2008)

INVENTOR: Parnes, Baruch - Tel Aviv, Israel (IL) Frankel, Nachum - Herzliya, Israel (IL)**APPL-NO:** 752565 (08)**FILED-DATE:** November 21, 1996**GRANTED-DATE:** June 29, 1999**PRIORITY:** November 22, 1995 - 116100, Israel (IL)

ASSIGNEE-PRE-ISSUE: November 21, 1996 - ASSIGNMENT OF ASSIGNORS INTEREST (SEE DOCUMENT FOR DETAILS)., OFAKIM NERHAVIM CONSTRUCTION AND INVESTMENTS 1990 LTD. 63 BAR-COCHVA STREET PETACH-TIKVA, (1), Reel and Frame Number: 008325/0464

ASSIGNEE-AT-ISSUE: Ofakim Nerhavim Construction and Investments 1990 Ltd., Petach-Tikva, Iceland (IS), Foreign company or corporation (03)

CORE TERMS: prong, beam, rear, lift, lifting, fork, chassis, load, upright, mast, wheel, girders, loading, coupled, truck, sprocket, transverse, hydraulic, alternate, piston, car, longitudinal, horizontal, rigidly, arch, lifting-vehicle, correspondingly, reciprocating, boom, rail

ENGLISH-ABST:

A fork lift with retractably extendable loading prongs for lifting loads from either side of a vehicle. The fork lift includes a mechanism for displacing the prongs over and across the vehicle, which mechanism has front and rear transverse girders which can be rigidly secured to the vehicle's chassis. The mechanism further includes front and rear masts, sprocketed wheels mounted on the masts to move the front and rear masts reciprocally, and a longitudinal beam which is coupled to the masts. The longitudinal beam can move up and down. Front and rear uprights extend downwardly from the longitudinal beam. The prongs are retractably engaged to the bottom of the uprights and are moved with hydraulic pistons.

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Segments: Assignee, English-abst, Expiration, Filed-date, Granted-date, Inventor, Lit-reex, Priority, Publication, Reexam-litigate

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Samson Lift Techs. v. Jerr-Dan Corp.

09 Civ. 2493 (RJH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2009 U.S. Dist. LEXIS 69099

August 7, 2009, Decided

August 7, 2009, Filed

CORE TERMS: convenience, key witnesses, marketing, locus, misrepresentation, technology, attendance, weighs, tow trucks, convenience of witnesses, citations omitted, operative facts, materiality, unwilling, travel, moving party, little weight, important factor, nonparty witnesses, headquartered, misstatements, manufacture, distributor, slightly, omissions, reside, induce, venue, ease, selling

Available Briefs and Other Documents Related to this Case:

U.S. District Court Motion(s)

U.S. District Court Pleading(s)

OPINION**MEMORANDUM OPINION AND ORDER**

Defendants Jerr-Dan Corporation ("Jerr-Dan") and Oshkosh Corporation ("Oshkosh") have moved pursuant to 28 U.S.C. § 1404(a) for an order to transfer this action from the Southern District of New York to the Middle District of Pennsylvania. For the following reasons, defendants' motion is granted.

BACKGROUND

Plaintiff, Samson Lift Technologies, L.L.C. ("Samson"), is the owner of U.S. Patent No. **5,915,912**, a new product technology that allows tow trucks to pull alongside a parked car, elevate and retract the vehicle, and lower and secure it onto the tow truck's bed. (Compl. 4-5.)

Plaintiff entered into two contracts ("Agreements") with the defendants to manufacture, market, and sell Samson's proposed products. (*Id.* 5.) Samson is organized in [*2] Delaware but is headquartered in Florida, and Jerr-Dan and Oshkosh are organized and headquartered in Pennsylvania and Wisconsin, respectively. (*Id.* 2-3.)

In this action, plaintiff alleges various claims arising out of the contracts, that Jerr-Dan, *inter alia*, (1) fraudulently induced plaintiff to enter into the Agreements, which Jerr-Dan had no intention of performing, (2) negligently misrepresented material information about Jerr-Dan's intentions and plans to plaintiff, (3) breached the terms of the Agreements by developing and selling competing products, and (4) wrongfully converted plaintiff's patent by selling the products to United Kingdom, in violation of the Agreements. (*Id.* 23-34.)

DISCUSSION

28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The moving party has the burden to make a "clear and convincing showing" that transfer is proper. *Cartier v. D & D Jewelry Imports*, 510 F. Supp. 2d 344, 345 (S.D.N.Y. 2007) (citing *Habrout v. City of New York*, 143 F. Supp. 2d 399, 401 (S.D.N.Y. 2001)). The moving [*3] party must demonstrate that: "(1) the action is one that might have been brought in the proposed transferee forum, and (2) the transfer promotes convenience and justice." *Id.* (internal citations omitted). Plaintiff does not dispute that this action could have been brought in the Middle District of Pennsylvania. Thus, the only question to consider is whether transfer is proper considering the factors listed in the discussion below.

In determining whether to transfer, "[d]istrict courts have broad discretion in making determinations of convenience under Section 1404(a), and notions of convenience and fairness are considered on a case-by-case basis." *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 106 (2d Cir. 2006) (citing *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 117(2d Cir. 1992)). "There is no rigid formula for balancing these factors and no single one of them is determinative." *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 561 (S.D.N.Y. 2000).

Courts generally consider various factors in the analysis: "(1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience [*4] of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, [and] (7) the relative means of the parties." *D.H. Blair*, 462 F.3d at 106-07 (internal citations omitted).

1. The Plaintiff's Choice of Forum

This factor obviously tips against transfer, but the Court affords it less weight for two reasons. First, this forum is not the plaintiff's residence. See *Brasseler USA Dental, L.L.C. v. Discus Dental, Inc.*, No. 04 Civ. 9404 (NRB), 2005 U.S. Dist. LEXIS 14918, 2005 WL 1765706, at *4 (S.D.N.Y. July 25, 2005) (holding that plaintiff's choice is entitled to less weight because plaintiff was "not a resident of the Southern District of New York"); *Olympia Group, Inc. v. Cooper Industries, Inc.*, No. 00 Civ. 7367 (MBM), 2001 U.S. Dist. LEXIS 6187, 2001 WL 506219, at *3 (S.D.N.Y. May 14, 2001) ("The plaintiff's choice is entitled to less deference when the plaintiff does not reside in the chosen forum."). Second, the underlying dispute has little connection to New York, save for the fact that a Jerr-Dan distributor will testify to the sales and marketing of competing products by defendants in New York. See *Brasseler USA Dental*, 2005 U.S. Dist. LEXIS 14918, 2005 WL 1765706, at *4 (holding that plaintiff's choice [*5] is entitled to less weight because "the central issues of [the] case are only minimally connected to New York"). Thus, this factor weighs only slightly against transfer.

2. The Convenience of Witnesses

The parties are in dispute as to the location of the present action's key witnesses. While plaintiff

contends that the key witnesses are located in New York, defendants contend that the key witnesses are located in Pennsylvania and Wisconsin. (Def.'s Mem. Supp. Mot. to Transfer 6-7, 9; Pl.'s Mem. Opp. 9-10.)

In weighing this factor, "it is not the number of prospective witnesses that determines the appropriateness of a transfer but, rather, the materiality of their anticipated testimony." *Dwyer v. General Motors Corp.*, 853 F. Supp. 690, 693 (S.D.N.Y. 1994). "A court must qualitatively evaluate the materiality of the testimony that the witnesses may provide when assessing the convenience of witnesses." *Eres N.V. v. Citgo Asphalt Refining Co.*, 605 F. Supp. 2d 473, 480 (S.D.N.Y. 2009) (internal citations omitted).

While the Court agrees with plaintiff's contention that Mr. Nussbaum, the primary Jerr-Dan distributor in the New York area, may have relevant information regarding the sales and [*6] marketing of competing products in New York, because of the nature of plaintiff's claims, the key witnesses are those who have actively participated in the negotiation of the disputed contracts and the defendants' subsequent conduct relating to the production and marketing of plaintiff's design. Therefore, both the scope and materiality of the testimony that is expected to be provided by witnesses that reside in Pennsylvania and Wisconsin far outweigh those of any New York witnesses.

The convenience of witnesses is generally considered to be the most important factor in the transfer analysis. See *Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 197 (S.D.N.Y. 2000) ("The convenience of both party and nonparty witnesses is probably considered the single most important factor in the analysis of whether a transfer should be granted."). This factor weighs heavily in favor of transfer.

3. The Relative Ease of Access to Relevant Documents and Sources of Proof

This factor favors the forum in which it is easier to conduct merits-related discovery because of the forum's close proximity to relevant documents and other sources of evidence. See *In re Warrick*, 70 F.3d 736, 741 (2d Cir. 1995) (transfer [*7] proper when the new venue "would facilitate the parties' access to the testimony of the [witnesses], as well as to the documents that comprise and illuminate the Plan itself"). Although this factor has lost some of its original significance with the improvements in transportation and communications technology, it should be considered to the extent that it bears on the convenience calculus. See *Brasseler USA Dental*, 2005 U.S. Dist. LEXIS 14918, 2005 WL 1765706, at *4 ("The cost of copying and transporting these materials to New York, although by no means substantial, is a cost that can be avoided by a transfer of venue.").

As discussed below, the operative events occurred largely in Pennsylvania and the corresponding documents that pertain to the operative events are located there. The documents that the plaintiff contends are in New York do not go to the heart of the underlying dispute regarding the business decisions made in Pennsylvania with respect to the alleged fraudulent inducement and breach of contract. Therefore, this factor favors transfer.

4. The Convenience of Parties

Transferring the present case to Pennsylvania would cut down on substantial inconvenience imposed on the defendants, while not materially [*8] disadvantaging plaintiff who has to travel from Florida in any case. See *Eslworldwide.com, Inc. v. Interland, Inc.*, No. 06 Civ. 2503 (LBS), 2006 U.S. Dist. LEXIS 41935, 2006 WL 1716881, at *4 n.2 (S.D.N.Y. June 21, 2006) (holding that burden of traveling several more hours where party must travel anyway "not legally significant"); *Coker v. Bank of Am.*, 984 F. Supp. 757, 765 (S.D.N.Y. 1997) (same). Notwithstanding plaintiff's contention that Samson's manager Mr. Gelbart frequently travels to New York for business and charitable work, this factor weighs in favor of transfer.

5. The Locus of Operative Facts

While the parties' dispute touches on several locations, the Court concludes that the locus of operative events is Pennsylvania, not New York.

The heart of plaintiff's complaint is that defendants conspired and schemed to deceive and swindle plaintiff by acquiring access to Samson's patented technology through misrepresentations, then used such knowledge to gain an unfair advantage in doing business in the tow truck industry.

The operative events relating to fraud and misrepresentation are deemed occur in the place where such statements are made. See *Bank of America, NA. v. Hensley Properties, LP*, 495 F. Supp. 2d 435, 436, 440 (S.D.N.Y. 2007) [*9] (holding that operative events relating to allegations of fraud committed by making misstatements and omissions with the intent to induce defendant to enter into agreement occurred in the place where the meetings discussing the agreement occurred); accord *Laborers Local 100 and 397 Pension Fund v. Bausch & Lomb Inc.*, No. 06 Civ. 1942, 2006 U.S. Dist. LEXIS 36018, 2006 WL 1524590, at *5 (S.D.N.Y. June 05, 2006) (holding that locus of operative facts is where "all of the press releases and corporate filings, as well as the alleged misstatements" originated); *Purcell Graham, Inc. v. Nat'l Bank of Detroit*, No. 93 Civ. 8786, 1994 U.S. Dist. LEXIS 15196, 1994 WL 584550, at *4 (S.D.N.Y. Oct. 24, 1994) ("Misrepresentations and omissions are deemed to 'occur' in the district where they are transmitted or withheld, not where they are received.").

Plaintiff's claim that New York is the locus of operative facts largely depends on the arguments that Jerr-Dan directed its marketing efforts on New York City, that models provided by defendants proved to be defective at product demonstrations in New York City, and that the only product actually sold by Jerr-Dan was in the New York area. (Pl.'s Mem. Opp. 7.) Although this series of events was certainly the [*10] last straw for plaintiff in deciding to take action against defendants' alleged inability to live up to the terms of the Agreements, the actual operative events and defendants' alleged wrongful conduct are misrepresentations allegedly made by defendants to induce plaintiff into entering into the Agreements, the defendants' design and manufacture of competing products, the formulation and implementation of marketing and sales policies, and the filing of a competing patent, all of which primarily occurred at defendants' headquarters in Pennsylvania and Wisconsin.

"The location of the operative events is a 'primary factor' in a transfer motion." *WellQuest Int'l Inc. v. Genesis Intermedia.com, Inc.*, No. 00 Civ. 6558, 2001 U.S. Dist. LEXIS 16757, 2001 WL 1246592, at *4 (S.D.N.Y. Oct. 18, 2001) (quoting *ZPC 2000, Inc. v. SCA Group, Inc.*, 86 F. Supp. 2d 274, 279 (S.D.N.Y. 2000)). Accordingly, this factor weighs heavily in favor of transfer.

6. The Availability of Process to Compel Unwilling Witnesses

A New York court cannot compel the attendance of non-party witnesses located in Pennsylvania and Wisconsin, and a Pennsylvania court cannot compel the attendance of nonparty witnesses located in New York outside the 100-mile [*11] radius. Because, as discussed above, the Court finds that the key witnesses are located in Pennsylvania and Wisconsin, this factor favors transfer to the forum that can compel the attendance of any unwilling key witnesses to the action.

7. The Relative Means of the Parties

While there are allegations to indicate that the defendants are in better financial health to litigate this matter than is plaintiff, who is allegedly funding this lawsuit through the personal assets of Samson's principal, (Pl.'s Mem. Opp. 15), the Court finds that this factor leans only slightly against transfer because plaintiff is still a corporation. *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 697 (S.D.N.Y. 2009) ("This factor carries little weight when the party arguing to transfer is a corporation.") (citing *AEC One Stop Group, Inc. v. CD Listening Bar, Inc.*, 326 F. Supp. 2d 525, 531 (S.D.N.Y. 2004) ("When both parties are

corporations, however, this factor is given little weight.")).

CONCLUSION

Considering the totality of the circumstances, the Court finds that this case would be more expeditiously and justly resolved in the Middle District of Pennsylvania, where most of the operative [*12] events occurred, where most of the documents relating to the underlying dispute are located, and where most of the key witnesses are subject to the court's subpoena power.

The Court therefore GRANTS defendants' motion to transfer [6] and directs the Clerk of the Court to transmit the file in this action to the Clerk of the United States District Court for the Middle District of Pennsylvania.

SO ORDERED.

Dated: New York, New York

August 7, 2009

/s/ Richard J. Holwell ▾

Richard J. Holwell ▾

United States District Judge

Source: **Legal > / ... / > Patent Cases from Federal Courts and Administrative Materials**

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Application Number: 08/752565 AssignmentsFiling or 371(c) Date: 11/21/1996 eDan

Effective Date: 11/21/1996

Application Received: 11/21/1996

Patent Number: 5915912

Issue Date: 06/29/1999

Date of Abandonment: 00/00/0000

Attorney Docket Number: 6955

Status: 150 /PATENTED CASE

Confirmation Number: 7117

Title of Invention: FORK LIFT APPARATUS ADAPTED TO BE COUPLED TO A TRUCK OR TRAILER

Examiner Number: 62876 / BUCCI, DAVIDGroup Art Unit: 3652IFW Madras

Class/Subclass: 414/664.000

Lost Case: NO

Interference Number:

Unmatched Petition: NO

L&R Code: Secrecy Code: 1

Third Level Review: NO

Waiting for Response Desc.

Prior Art Filed

Secrecy Order: NO

Status Date: 04/03/2008

Oral Hearing: NO

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Status Changes: • **REISSUE REQUESTED** • **CERTIFICATE OF CORRECTION**

Assignee: Ofakim Nerhavim Construction and Investments 1990 Ltd IS

Patent Number: **US 5915912** Issue Date: **19990629**

Certificate of Correction date(s): 20080403

Reissue Request

Request Number	Request Date	O.G. Date	Examination Group	Reissue Patent No.
09/894897	20010629	20030617	3652	US RE39997
11/352518	20060213	20070220	3652	